No. 99-557

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In The

Supreme Court of the United States

SOUTHEASTERN PENNSYLVANIA TRANSPORTATION AUTHORITY,

Petitioner,

v.

CATHERINE NATSU LANNING, ALTOVISE LOVE, BELINDA KELLY DODSON, DENISE DOUGHERTY, AND LYNNE ZIRILLI

and

UNITED STATES OF AMERICA,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTION PRESENTED

Under the Civil Rights Act of 1991 ("CRA"), once an employment practice is shown to cause a discriminatory disparate impact, the employer must "demonstrate that the challenged practice is job related for the position in question and consistent with business necessity" to defeat liability. 42 U.S.C. § 2000e-2k. The Interpretative Memorandum, which Congress delineates in the CRA as the only source of guidance on the meaning of the term "business necessity," Pub L. No. 102-166, § 105(b), 105 Stat. 1071, 1075 (1992), instructs that:

> The terms "business necessity" and "job related" are intended to reflect the concepts enunciated by the Supreme Court in *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971), and in the other Supreme Court decisions prior to *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642 (1989).

137 Cong. Rec. 28,680 (1991).

The question presented is:

Whether the Third Circuit correctly ruled that, where a hiring test excluded 93% of female applicants, the district court violated the requirements of the CRA by requiring only that the employer articulate that its cutoff score was "readily justifiable" without proof that it was "consistent with business necessity" and correctly remanded the case for the employer to show that its test meets "the business necessity standard implicit in *Griggs* and incorporated by the Act" which requires that the "discriminatory cutoff score" be shown to measure the

QUESTION PRESENTED – Continued

"minimum aerobic capacity necessary to perform successfully the job of SEPTA transit police officer." Pet. App., pp. 22a, 25a.

PARTIES TO THE PROCEEDING

The petition accurately lists the parties to the proceeding but Respondents wish to clarify that the class consists of 93% of all female applicants who have applied since 1993 and all future female applicants who are rejected under the same selection test.

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STATEMENT OF THE CASE

A. Introduction

This case involves a challenge to a physical entrance examination developed by Southeastern Pennsylvania Transportation Authority (SEPTA) for transit police candidates that requires all applicants to run 1.5 miles in 12 minutes (hereafter "the test") prior to hire or training.[1] Running 1.5 miles in 12 minutes corresponds to an aerobic capacity of 42.5 mL/kg/min. As a result of the test, 93% of female applicants since 1993 were denied employment because of their performance on this single hiring measure.[2] Pet. App., p. 88a, FOF 213. By contrast, approximately 56% of male applicants have passed the test during the class period, making them eligible to continue with the employment process. Pet. App., p. 88a, FOF 213. There was no evidence that any other jurisdiction in the nation uses such an exclusionary test. The United States

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[1] SEPTA has never argued that transit officers need to run 1.5 miles in 12 minutes in the course of their duties. Rather, it contended that the running test measured aerobic capacity at a level of 42.5 mL/kg/min and that aerobic capacity at this specific level was a proxy for whether a person is able to perform the job successfully and was able to chase and apprehend fleeing suspects. SEPTA asserted that persons with a lower aerobic capacity were not capable of performing the tasks of SEPTA police officers. FOF 125, J.A. Vol. II at 374-375.

[2] A failure of the test by even one second bars the applicant from further participation in the process, regardless of other skills or police experience the candidate may have. Pet. App., pp. 75a-76a, 77a, FOF 136-139, 146. The test may be administered months or even years before hire, and there is no re-test prior to Academy training or actual assignment as a transit officer. Pet. App., p. 78a, FOF 150.

Drug Enforcement Agency, the United States Secret Service, the FBI, numerous urban transit police departments (New York City, Washington, D.C., Amtrak), the Philadelphia Police, and Pennsylvania's statewide municipal police certification standards, do not use such an exclusionary requirement, or anything close, to hire agents and officers, but instead rely upon training academies to get physically qualified officers. J.A., Vol. VIII at 2464. During the same period that SEPTA used this selection test, SEPTA administered the same test to its incumbent transit police officers. Many incumbent SEPTA transit officers could not meet the selection cutoff for applicants, but no officer ever was found to have failed physically to perform the job safely or satisfactorily. Pet. App., pp. 92a, 97a-98a, FOF 231-233, 256-259. Even with many SEPTA transit officers who did not meet the selection cutoff, SEPTA was able to successfully reduce and fight crime. Most importantly, SEPTA could not identify a single incident where an officer was found to have been unable to apprehend a fleeing suspect or provide effective backup or assistance to another officer. Thus, there was never a demonstrated public safety reason or other business necessity for using a test that was easier for men but harder for women to pass and that resulted in a transit police force of less than 7% women.[3] *Lanning, et al. v. SEPTA*, 181 F.3d 478 (3d Cir. 1999), Pet. App., p. 7a.

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[3] In the six years from when the test began to be utilized until the time of trial, only 9 women passed SEPTA's running test as compared to 643 men. Pet. App., 87a, FOF 203, 209.

B. Procedural History

Five individual women,[4] representing the class of excluded women applicants since 1993, brought suit in federal district court under Title VII as amended by the CRA. 42 U.S.C. § 2000e-1. The United States Department of Justice subsequently joined in the suit, alleging that SEPTA violated Title VII as amended by engaging in a pattern or practice of discrimination against women through its exclusionary hiring test. 42 U.S.C. § 2000e-6. The plaintiff class was certified on August 10, 1997, pursuant to Fed.R.Civ.P. 23(b)(2), and is defined as:

> all 1993 female applicants, 1996 female applicants and future female applicants for employment as SEPTA police officers who have been or will be denied employment by reason of their inability to meet the physical entrance requirement of running 1.5 miles in 12 minutes or less.

Pet. App., pp. 462-472, FOF 2.

The district court ruled that SEPTA's test caused "severe adverse impact" with statistically significant "gross disparities" excluding 93% of all women since 1993. Pet. App., pp. 87a-89a, 130a-131a, FOF 209-216, COL 12-17. Consequently, the district court focused upon whether SEPTA met its burden under the Act to justify the continued use of a discriminatory test by showing that it was "job related for the position in question and

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[4] Four of the five individual named Plaintiffs have had successful police officer careers with other departments including those with concurrent jurisdiction with SEPTA for policing the subway elevated lines. Pet. App., pp. 79a-82a, FOF 154, 155, 160, 166, 167, 173, 174.

consistent with business necessity" or, if SEPTA met that burden, whether Plaintiffs could show that less discriminatory alternatives existed that would serve SEPTA's employment goals. 42 U.S.C. § 2000e-2k.

The district court held against the plaintiffs. It held that the test was job related. With respect to the second prong, the business necessity requirement, it held that the employer need only show that the challenged practices "significantly serve, but are *neither required by nor necessary to, the employer's legitimate business interests.*" Pet. App., p. 129a, COL 8 (emphasis provided). The district court then held that SEPTA met its burden on business necessity because its cutoff score was "readily justifiable." Pet. App., p. 22a. Finally, the Court held that Plaintiffs had not demonstrated less discriminatory alternatives.

Both the Lanning Plaintiffs and the United States appealed. Among other things, the Appellants argued that the district court erred as a matter of law by using a business necessity standard that had been articulated in *Wards Cove* and changed prospectively by Congress in the CRA. The Appellants argued that the district court approved a test that is much easier for men to pass and excludes most women without a showing that the test was necessary to successfully perform transit policing duties even as defined by SEPTA.[5]

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[5] This is not a case where Respondents are challenging SEPTA's *performance* standard. It is undisputed that transit officers do not need to run 1.5 miles in 12 minutes in the course of their duties. Rather the 1.5 mile in 12 minutes selection test is being used as a proxy to identify successful police officers.

The Third Circuit agreed that the district court "did not apply the standard we have found to be implicit in *Griggs* and incorporated by the Act" and instead relied upon a standard that "mirrors the standard adopted by *Wards Cove*."[6] Pet. App., pp. 20a-21a. The Third Circuit held that "the *Wards Cove* standard does not survive the Act" and concluded:

> "Accordingly, we hold that the business necessity standard adopted by the Act must be interpreted in accordance with the standards articulated by the Supreme Court in *Griggs* and its pre-*Wards Cove* progeny which demand that a discriminatory cutoff score be shown to measure the minimum qualifications necessary for the successful performance of the job in question in order to survive a disparate impact challenge."

Respondents' challenge is that the cutoff for selection has not been shown to equate with the ability to successfully perform the job even according to SEPTA's performance standards.

[6] The *Wards Cove* standard was "whether a challenged practice serves, in a significant way, the legitimate employment goals of the employer. . . . [T]here is no requirement that the challenged practice be 'essential' or 'indispensable' to the employer's business . . . ." *Wards Cove Packing Co., Inc. v. Atonio*, 490 U.S. 642, 659 (1989). Congress explicitly changed the *Wards Cove* standard for business necessity with the passage of the CRA finding that it had "weakened the scope and effectiveness of Federal civil rights protections." Congress' express purpose in passing the CRA was to codify "the concepts of 'business necessity' and 'job related' enunciated by the Supreme Court in *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971), and in the other Supreme Court decisions *prior* to *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642 (1989)." 42 U.S.C. § 1981, Note, Congressional Findings and Purposes of 1991 Amendments.

Pet. App., pp. 19a-21a. The Third Circuit found that the district court upheld SEPTA's cutoff score on the grounds that it was "readily justifiable" and that "*nowhere* in its extensive opinion did the District court consider whether Dr. Davis' 42.5 mL/kg/min cutoff reflects the minimum aerobic capacity *necessary* to perform successfully the job of SEPTA transit police officer." Pet. App., p. 22a. (emphasis provided).

The Third Circuit vacated the district court's decision and remanded[7] the case to the district court to apply the "business necessity standard implicit in *Griggs* and incorporated by the Act." Pet. App., p. 25a. The Third Circuit issued a mandate on September 3, 1999 and denied SEPTA's motion to stay the mandate pending its petition for writ of certiorari. On remand, Petitioner will be entitled to show whether it can meet its burden of proving that its test is necessary for obtaining successful transit officers notwithstanding its discriminatory impact upon female applicants. Thus, at this stage, no final judgment has been entered by the district court.

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[7] In light of the remand on the business necessity standard, the Third Circuit did not reach the other assertions of error that the plaintiffs made on appeal. Pet. App., p. 3a. The *Lanning* plaintiffs also appealed the district court on the following grounds: 1) failure to apply the requisite higher legal burden because of the severe disparate impact, post hoc validation tests, low correlations and overemphasis on one aspect of job performance; 2) failure to apply the CRA's burden for job-relatedness for the cutoff score; and 3) failure to apply CRA's standard for determining whether less exclusionary alternatives exist.

PETITIONER'S FACTUAL MISREPRESENTATIONS

A. Petitioner misrepresents that it demonstrated that its cutoff score is the level needed to successfully perform the job and that anything less presents a risk to the public.

The Third Circuit held that it was demonstrated "nowhere" in the district court's opinion that SEPTA's selection cutoff was the level necessary for successful performance and the entire reason for the remand was to determine *what level* is necessary for successful performance and to ensure the public's safety. Pet. App., p. 22a. Thus, Petitioner's statement that an aerobic capacity of 42.5 mL/kg/min is the level necessary for successful performance is a misrepresentation.

SEPTA adopted its test based on the recommendation of Dr. Paul Davis, an exercise physiologist, even though he never conducted any actual physical tests with SEPTA incumbents to determine what level of physical fitness they needed for successful performance as transit officers. J.A., Vol. VII at 2039. Dr. Davis also concluded that SEPTA police were already "above average" in physical fitness. J.A., Vol. VII at 2041. Remarkably, three years prior to recommending the 12 minute 1.5 mile run for SEPTA, Dr. Davis conducted a study of 150 police officers in Florida in which he concluded that the 12 minute 1.5 mile run was *not* related to successful performance on job related tasks including chasing and apprehending a fleeing suspect and that less discriminatory alternatives relating to successful performance existed. J.A., Vol. IX at 2774.

The only study that was done to determine the physical capacity needed for a transit officer was that conducted by SEPTA and its expert Dr. Moffatt after litigation began. Pet. App., pp. 116a-117a, FOF 326, 328, 330. The district court stated that Dr. Moffatt conducted a simulation of what SEPTA described as the "critical task" of pursuing and apprehending a suspect for the distance and speed designated by SEPTA as necessary for the job. Pet. App., pp. 117a-119a, FOF 330-333, 337-340. An officer with an aerobic capacity of 35 mL/kg/min who was the only officer tested with an aerobic capacity below 42.5 mL/kg/min, successfully completed the task. J.A., Vol. VII at 2210-2211. This officer's successful performance undermines any claim by SEPTA that its cutoff of 42.5 mL/kg is necessary for successful or safe performance. Dr. Moffatt's subsequent laboratory simulation further repudiates the necessity of 42.5 mL/kg/min since all 16 people with an aerobic capacity below 42.5 mL/kg/min who were tested on the "critical task," as defined by SEPTA, successfully performed. Pet. App., p. 119a, FOF 340; J.A. Vol. IX, pp. 2896-2899, 2901.

"Successful" officers by SEPTA's own performance standards cannot meet its selection cutoff for applicants. SEPTA officials conceded that there has never been an instance of an incumbent officer[8] who was below the 42 mL/kg/min selection threshold who was unable to perform his or her duties. J.A., Vol. II at 315; J.A., Vol. IX at 2752; J.A., Vol. VII at 2209. SEPTA has also promoted at

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[8] For example, there have been 182 instances where one of SEPTA's 234 active-duty officers failed the 42.5 mL/kg/min aerobic capacity test. Pet. App., p. 95a, FOF 246.

least 10 incumbent officers who have failed the applicant selection test. SEPTA has also given special recognition and commendations for outstanding performance to numerous other officers who have failed its applicant selection test. Pet. App., pp. 97a-98a, FOF 256-259. Most significantly, SEPTA has never disciplined, removed, reassigned, suspended or demoted any officer "for failing to perform the physical requirements of the job." Pet. App., p. 98a, FOF 259. Similarly, there has never been an occasion in which loss of life, damage to property or harm to an individual occurred as a result of a police officer having an aerobic capacity below 42.5 mL/kg/min J.A., Vol. II at 391-392.

One of the most vivid examples of the lack of necessity for the selection cutoff is SEPTA's inadvertent hiring of Officer Tracy Thomas, *after* the test was implemented even though she could not meet SEPTA's selection cutoff. Pet. App., pp. 7a, 98a-99a, FOF 260-263. SEPTA has classified Officer Thomas as a successfully performing officer in many different ways. Officer Thomas is a "decorated" SEPTA officer who has been repeatedly nominated as Officer of the Year and Officer of the Quarter. SEPTA chose to have Officer Thomas be one of two officers in charge of training its officers in defensive tactics. She also serves on foot patrol when she is not training officers and has been commended for her outstanding police officer performance. *Id.*

SEPTA tried to prove that it could increase the number of arrests if it had officers with higher aerobic capacity by presenting speculative statistical and hypothetical analyses. However, SEPTA made no showing of a single reported incident in which an arrest was not made

when a perpetrator was just out of reach of the officer. SEPTA's statements about increased arrests are sheer speculation based on science that the Third Circuit found to be "at a minimum, disconcerting" and are not supported by *any* real world examples. Pet. App., p. 23a n. 21.

"Successful" departments nationwide, including the United States Drug Enforcement Agency, the United States Secret Service, the FBI, numerous urban transit police departments, the Philadelphia Police, and the Pennsylvania Municipal Police Officers Education and Training Commission certification standards that govern 1,200 municipalities, do not use a test even remotely as restrictive as SEPTA's and have been successfully combating crime for years. J.A., Vol. VIII at 2464.

The issue for remand is precisely whether SEPTA can prove that its selection cutoff is necessary for successful and safe performance of the transit officer job.

B. Petitioner misrepresents that the duties of its transit officers are uniquely different from all other departments and require greater physical capacity.

Underlying Petitioner's contention that its exclusionary hiring regimen is a business necessity is its claim of uniqueness. Petitioner argues that its transit officers cover a unique terrain alone and on foot and thus require a higher aerobic capacity than other departments' officers in order to combat crime successfully. SEPTA transit officers are not unique.

Many police departments have foot based officers who patrol alone but do not have exclusionary hiring tests as demanding as SEPTA's.

For example, the Philadelphia Police Department deploys over 500 foot patrol officers, with foot beats equivalent in length and intensity to those patrolled by SEPTA transit officers. This includes patrols in high-crime areas and areas including housing projects, where police must ascend stairs. J.A., Vol. IV at 1228-1232; J.A., Vol. V at 1422-1423, 1439. The number and frequency of serious crimes faced by Philadelphia officers is significantly higher than that faced by SEPTA transit officers. A typical tour of duty for a SEPTA police officer involves having one "job," or contact of any sort, in eight hours. J.A., Vol. V at 1377. A Philadelphia police officer, by contrast, handles between ten and twenty-five "jobs" per shift. J.A., Vol. V at 1441. There is one Part I crime[9] on the entire SEPTA system per day; in many instances it is officers with the Philadelphia Police Department, not SEPTA, that respond first to these crimes. J.A., Vol IX at 2717. By contrast, the Philadelphia Police force handles approximately 252 Part I crimes per day. J.A. Vol, IX at 2601; J.A., Vol. IV at 1232-1234.

In fact, between 20 and 36% of crime on SEPTA property is responded to and handled by Philadelphia Police. J.A., Vol. IX at 2717; J.A., Vol. IX at 2600. All 911 emergency calls made from telephones on or adjacent to

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[9] A Part I crime is a serious felony. The designation is that used by the FBI's Uniform Crime Reports. J.A., Vol II at 352.

SEPTA property are responded to directly by Philadelphia Police, by-passing SEPTA police entirely. J.A., Vol. II at 346-347. This means that Philadelphia Police respond at the same subway stations, rail stations, and elevated train tracks, as do SEPTA officers. SEPTA conceded that they did not know of any deficiency in the physical performance of responding Philadelphia Police on SEPTA property. J.A., Vol. IX at 2633.

Police for the Washington D.C. transit authority, the New York City transit authority, and AMTRAK, like SEPTA, are largely foot-based and patrol areas with lengthy platforms and stairs. J.A., Vol. IV at 1161-1166; J.A., Vol. IV at 1195-1198.

Chasing and apprehending of suspects on foot are tasks critical to all police departments and law enforcement officials. Thus, a job of a transit officer for SEPTA is one that neither requires peculiar physical skills for a unique terrain nor is more difficult or dangerous than that of urban or other mass transit police officers.

C. Petitioner misrepresents that its test successfully resulted in a reduction in crime.

Petitioner misrepresents that since the inception of its test in 1991, SEPTA reduced crime in its transit system by 70%. SEPTA demonstrated absolutely no causal connection between the drop in crime and its test. Moreover, 50% of the crime was reduced in 1991 *before the challenged test resulted in any new hires* when SEPTA began to utilize the "zone system," which concentrated the geographic efforts of its transit officers in the subway system and abandoned the policing of the bus system and protection

of property at depots, leaving those duties to the Philadelphia police. Pet. App., pp. 50a-54a, FOF 26. J.A., Vol. II at 386-387, J.A., Vol VIII at 2342; J.A., Vol VI at 1686-1687, J.A., Vol. VIII at 2341-2342. During the ensuing years, when crime was reduced further, SEPTA increased its patrol force, from a low of approximately 96 to a current force of approximately 234. Pet. App., pp. 54a, 59a-60a, FOF 27, 57, 208; J.A., Vol. VIII at 2333-2334. During the same period that crime was reduced, many incumbent transit police officers could not meet the selection cutoff required for applicants, thereby again undermining the argument that the selection cutoff was responsible for the drop in crime. Pet. App., pp. 94a-95a, FOF 243-246. Most importantly, no incumbent officer was ever found to have been unable to apprehend a fleeing suspect or provide effective backup or assistance to another officer because of not being able to meet the selection cutoff.

No connection was shown between the drop in crime and SEPTA's physical selection test. By contrast, a direct connection was shown between SEPTA's physical test and the near elimination of women from its force. Pet. App., p. 87a, FOF 208.

REASONS FOR DENYING THE WRIT

I. THIS CASE IS NOT RIPE FOR REVIEW SINCE THERE HAS BEEN NO FINAL DECISION.

The procedural posture of the case makes a writ of certiorari premature since the Third Circuit has simply vacated the district court's decision and remanded it to

determine whether the employer can meet its burden under the CRA of showing the cutoff score is "consistent with business necessity". *See Texas v. Hopwood*, 518 U.S. 1033 (1996) (opinion of Ginsburg, J., respecting the denial of the petition for certiorari); *Virginia Military Inst. v. United States*, 508 U.S. 946 (1993) (opinion of Scalia, J., respecting the denial of the petition for certiorari); *Brotherhood of Locomotive Firemen v. Bangor & Aroostok RR*, 389 U.S. 327, 328 (1967) (per curium) (denying writ as premature because the circuit court had remanded the case for a final decision under the proper legal standard); *Hamilton-Brown Shoe Co. v. Wolf Bros. & Co.*, 240 U.S. 251, 257-259 (1916) (certiorari jurisdiction should be "exercised sparingly" and "except in extraordinary cases, the writ is not issued until final decree"). Petitioner does not challenge the main import of the Third Circuit's decision which was to reverse the district court's use of a *Wards Cove*, rather than CRA, standard for business necessity. Petitioner only disputes the Third Circuit's articulation of the CRA standard. The case is not ripe for this Court's review at this stage because the district court has not decided the case under the CRA and thus, the full dimension of any question about the "business necessity" standard has not been finally determined. In addition, if upon remand, Petitioner is able to show that its selection cutoff is necessary to successful performance then the issue presented here would be moot.

II. THERE IS NO CONFLICT AMONG THE CIRCUIT COURTS AS TO THE CRA'S BUSINESS NECESSITY STANDARD.

Petitioner attempts to establish a conflict among circuit courts on the issue of the CRA's business necessity standard where there is none. Decisional law has been both consistent[10] with and supportive of the Third Circuit's holding that the CRA business necessity requirement prospectively changed the *Wards Cove* standard used by the district court, and reinstated *Griggs*.

A. The Third Circuit's decision mandates that cutoff scores screen for the "minimum qualifications necessary for successful performance of the job in question."

The major thrust of the Third Circuit's decision was that the district court had not required SEPTA to prove that its test was "consistent with business necessity" under the proper CRA standard and instead applied *Wards Cove*. In fact, the Third Circuit stated that "nowhere in its extensive opinion did the district court consider" whether the hiring cutoff score reflected what was the "minimum aerobic capacity *necessary* to perform successfully the job of SEPTA" or whether SEPTA was unnecessarily excluding women who could successfully do the critical tasks of the job as defined by SEPTA. Pet.

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[10] The paucity of decisions discussing the "business necessity" standard in depth in the eight years since the passage of the CRA demonstrates the lack of frequency that this question is encountered by the courts and is another reason that review by this Court is inappropriate at this time.

App., p. 22a. The Third Circuit remanded the case for proper compliance with the demands of the CRA.

Petitioner describes the Third Circuit's holding as a "minimum qualifications" test implying that applicants would have to be hired who are minimally qualified and who would be unable to safely and successfully perform the duties of a transit police officer, thereby endangering lives. Petitioner deceptively omits the following critical language from the holding to create this impression: "the minimum qualifications *necessary for the successful performance* of the job in question." Pet. App., p. 22a. (emphasis added). The full holding mandates that the qualifications be high enough for applicants to *successfully* perform the job of transit officer, not those who would put the public or themselves at risk. Conversely, if there are those who could perform successfully below the cutoff level, then the cutoff level is not necessary to successful performance and is unnecessarily excluding qualified people.

The Third Circuit's decision would not require that Petitioner settle for "mediocre job performance" nor would it prevent "upgrading" its job force. Pet. Br., p. 20. In the context of this case, the Third Circuit's use of the word "minimum" simply means that an employer cannot set a cutoff score at a level that is *higher* than what is necessary to perform the job successfully. Pet. App., p. 17a, EEOC Guidelines, 29 C.F.R. § 1607.5(H) (cutoff scores should "be set so as to be reasonable and consistent with normal expectations of acceptable proficiency within the work force.") Clearly, requiring that the qualifications that are discriminating against women are necessary to successful performance as a police officer is not a "radical

departure" from *Griggs*,, its progeny, or post CRA circuit cases. Pet. Br., p.14

B. The Third Circuit's decision is consistent with other circuits.

The Third Circuit's decision is consistent with the decisions of other circuit courts that have discussed the CRA's business necessity standard. The circuits uniformly agree that the CRA statutorily prospectively changed *Wards Cove*. Thus, the district court's holding that a discriminatory test is permissible even if it is "neither required by nor necessary to an employer's legitimate business interests" as long as it was "readily justifiable" is contrary to the precedent of other circuits since the CRA. Pet. App., pp. 129a, 134a.

Federal courts interpreting the CRA have applied the heavier burden of *Griggs*, and rejected *Wards Cove*, in requiring the employer to prove business necessity when an employment practice causes a disparate impact. *See e.g., Anderson v. Zubieta*, 180 F.3d 329 (D.C. Cir. 1999) (CRA disparate impact requirements follow the *Griggs* standard); *Smith v. City of Des Moines*, 99 F.3d 1466, 1470-71 (8th Cir. 1996) (*Wards Cove* broadened business necessity defense but the CRA restored pre-*Wards Cove* law to a more favorable standard for plaintiffs); *Bradley v. Pizzaco of Nebraska, Inc.*, 7 F.3d 795 (8th Cir. 1993); *Fitzpatrick v. City of Atlanta*, 2 F.3d 1112 (11th Cir. 1993).

In *Bradley v. Pizzaco*, the court ruled that the CRA "reinstated" the law as it existed before *Wards Cove*. *See* 7 F.3d at 797. The Court stated that under *Wards Cove* the employer bore only the burden of producing evidence of

a legitimate business justification, but that the CRA returned the burden of persuasion regarding business justification to the employer. *See id.* "This burden is a heavy one" and requires the employer to show that the practice has a manifest relationship to the job, a compelling need to maintain the practice, and that there is no alternative to the challenged practice. *See id.* at 798. Likewise in *Fitzpatrick v. City of Atlanta*, cited by Petitioners, the court held that the CRA "statutorily reversed" *Wards Cove* on the issue of business necessity and that employers now "must demonstrate business necessity in order to avoid liability." 2 F.3d at 1118-1119, n. 5.

Not one case cited by Petitioners is in conflict with the Third Circuit's decision. Petitioner cites for support numerous circuit cases that were decided prior to the codification of business necessity in the CRA making them wholly irrelevant, especially in light of the CRA's specific mandate that only Supreme Court case law prior to *Wards Cove* is relevant. Pet. Br., p. 16, n. 12.

Those post CRA circuit cases cited by Petitioner are not in conflict with the Third Circuit. For example, *Smith v. City of Des Moines*, supports the Third Circuit's *Lanning* decision by stating that an employer's defense requires that a requirement have *both* a "manifest relationship to the employment in question" *and* "be necessary to safe and effective job performance." 99 F.3d 1466, 1471 (8th Cir. 1996) (*quoting Dothard v. Rawlinson*, 433 U.S. 321 (1977)). Indeed, the *Smith* language (i.e., "necessary to safe and effective job performance") closely mirrors that

of the Third Circuit in *Lanning* (i.e., "minimum qualifications necessary for successful performance of the job"). Petitioner excised the critical phrase (i.e., "necessary for successful performance") from the *Lanning* decision to make the obvious parallel fade.

Fitzpatrick also supports the Third Circuit's holding in this case by stating that "[m]easures demonstrably necessary to meeting the goal of ensuring worker safety are therefore deemed to be 'required by business necessity'. . . . " 2 F.3d at 1119.

The three other cases cited by Petitioner do not even discuss "business necessity" and confine their analysis to the job-relatedness requirement of the CRA. *Allen v. Energy Corp.*, 181 F.3d 902 (8th Cir. 1999) (appeal concerned job-related prong and less discriminatory alternatives, not business necessity requirement); *Association of Mexican-American Educators v. State of California*, 181 F.3d 902 (9th Cir. 1999); *NAACP v. Town of East Haven*, 70 F.3d 219 (2d Cir. 1995).

To say that none of the other circuits used the exact language as the Third Circuit certainly does not create a conflict: all the decisions emphasize that where there is a discriminatory impact the test requirements must be consistent with business necessity, which is entirely consistent with saying that only "the minimum qualifications *necessary for successful performance* of the job in question" are permissible. Since the passage of the CRA the circuit courts have applied the business necessity standard consistently.

C. The Third Circuit's Articulation of The CRA's Business Necessity Standard Is Completely Consistent With This Court's Precedent.

Congress provided specific guidance that business necessity should be interpreted with reference only to pre-*Wards Cove* Supreme Court precedent. Civil Rights Act of 1991, Pub L. No. 102-166, § 105(b), 105 Stat. 1071, 1075 (1992); 137 Cong. Rec. 28,680 (1991). The Third Circuit's *Lanning* decision is entirely faithful to *Griggs* and its progeny. The Third Circuit remanded the case to the district court to determine whether Petitioner could show that the cutoff score was necessary to successful performance in order to justify its continued use given the overwhelming showing of discriminatory exclusion. Pet. App., p. 22a.

The Third Circuit was entirely correct in rejecting the district court's reliance on the minimal burden set forth in *Wards Cove*.[11] Congress aimed at substantially correcting the "weakened scope and effectiveness" of disparate impact law occasioned by *Wards Cove* with the CRA. 42 U.S.C. § 1981, Note, Congressional Findings & Purposes of 1991 Amendments.

The Third Circuit's opinion articulating how business necessity must be shown in the context of a cutoff score

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[11] Petitioner cannot rely upon other Supreme Court dicta or plurality opinions that parallel the *Wards Cove* language in an effort to create the impression of a conflict between the Third Circuit's decision and those of this Court. Pet. Br., p. 15. *New York City Transit Auth. v. Beazer*, 440 U.S. 568 (1979) (dicta); *Watson v. Fort Worth Bank & Trust*, 487 U.S. 977 (1988) (plurality opinion).

on a hiring test is entirely consistent with and indeed echoes the mandates of earlier Supreme Court disparate impact hiring cases. *Griggs v. Duke Power Co.*, 401 U.S. 424, 431 (1971); *Connecticut v. Teal*, 457 U.S. 440 (1982); *Dothard v. Rawlinson*, 433 U.S. 321 (1977); *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 431 (1975).

In *Griggs*, the Supreme Court addressed hiring requirements that an employer believed would "improve the overall quality of the work force" but which discriminatorily excluded black applicants. To maintain such a discriminatory practice, the Court held that the "touchstone is business necessity" and rejected the test because incumbent employees who did not satisfy the hiring requirements performed the specific job "satisfactorily" and achieved promotions, thereby demonstrating that the test was "not needed." 401 U.S. 424, 431-432. In other words, to use the *Lanning* Court language, the *Griggs* hiring criteria were not the "the minimum qualifications *necessary for successful performance* of the job in question" since there were incumbents who were below the qualifications but who satisfactorily (i.e., successfully) performed the specific job. *Id.* Pet. App., p. 22a. (emphasis provided).

The essence of the business necessity standard first enunciated in *Griggs* is to prevent "arbitrary and unnecessary barriers" to employment. *Griggs v. Duke Power Co.*, 401 U.S. 424, 431 (1971) (cited in the Third Circuit's *Lanning* decision, Pet. App., p. 10a) Once job requirements are proven to have a discriminatory impact it is not onerous to require an employer to prove that it is a

"business necessity" to continue discriminating. Otherwise, employers could use seemingly neutral qualifications in order to " 'freeze' the status quo of prior discriminatory employment practices." *Griggs*, 401 U.S. at 427, 430.

In *Albemarle Paper Co. v. Moody*, a company adopted a test using the national norm as a cut-off score in a general effort to deal with a "increasing sophistication of plant operations" but successfully performing incumbents were not required to pass the test. 422 U.S. 405 (1975). Among the reasons used to reject this testing practice, this Court stated:

> The fact that the best of those employees working near the top of a line of progression score well on a test does not necessarily mean that test, or some particular cutoff score on the test, is a permissible measure of the *minimal qualifications* of new workers entering lower level jobs.

Id. at 434 (emphasis provided). Again, the Third Circuit's holding mirrors *Albemarle*.

In *Dothard v. Rawlinson*, the challenge was to established height and weight cutoff requirements for state prison guards which excluded 41% of female applicants and less than 1% of male applicants. This Court rejected the defendant's argument that the requirements served as a proxy for strength because they failed to provide evidence as to the "requisite *amount* of strength thought to be *essential* to good performance." 433 U.S. 321, 332 (1977). (emphasis provided). For a discriminatory practice to survive a Title VII challenge it must satisfy the "touchstone" of business necessity: it must be "shown to

be necessary to safe and efficient job performance." *Id.* at 332 n. 14.

The Third Circuit's holding in *Lanning v. SEPTA* is virtually interchangeable with any of this Court's pre-*Wards Cove* holdings in hiring cases that Congress incorporated into the CRA. SEPTA must prove, not simply assert, that its cutoff score that excludes 93% of female applicants is the minimum qualification necessary to get successful performance of transit officers. *Griggs*, 401 U.S. 424; *Dothard*, 433 U.S. 321; *Albemarle*, 422 U.S. 405.

D. Public Safety Is Integral to The Third Circuit's Articulation of The CRA's Business Necessity Standard.

Petitioner SEPTA claims that review is necessary because the Third Circuit majority holding endangers public safety. Specifically, Petitioner argues the following points: 1) the Third Circuit refuses to recognize the importance of public safety in applying the business necessity standard; 2) the Third Circuit standard requires employers to *"lower"* occupational standards; and 3) this result is in direct conflict with six other circuits. Each of these contentions is false.

1. The Third Circuit's business necessity holding incorporates public safety considerations.

SEPTA's contention that the Third Circuit "deems the consideration of public safety to be irrelevant to its analysis" is sustained only by its selective excising of the

majority opinion. Pet. App., pp. 19a-20a n. 16. Petitioner omits the language explicitly incorporating "public safety" considerations into the "business necessity" test:

> *"[T]he standard itself takes public safety into consideration.* If, for example, SEPTA can show on remand that the inability of a SEPTA transit officer to meet a certain aerobic level would significantly jeopardize public safety, this showing would be relevant to determine if that level is necessary for the successful performance of the job. *Clearly a SEPTA officer who poses a significant risk to public safety could not be considered to be performing his job successfully."*

Id. (emphasis provided). Nothing more need be said regarding the spuriousness of SEPTA's contention.

2. Business necessity does not require employers to lower occupational standards.

Nothing in the Third Circuit majority's decision could be remotely considered to direct employers to *"lower"* standards to the lowest common denominator. What SEPTA ignores in this unsubstantiated rhetoric is the requirement that scrutiny of employment eligibility thresholds arises only where there is an initial showing of discriminatory disparate impact. In the absence of the same, employers are free to increase standards as they see fit. Where disparate impact (and in this case *extreme* disparate impact) is proved, the employer need not lower standards but must show that its selection devices are "necessary" to successful performance of the job. The purpose of the remand by the Third Circuit was to give SEPTA the opportunity to make precisely that showing of

what level is necessary for successful performance, and not to enforce a 'lowering' of employment standards below any "public safety" threshold.

3. There is no conflict among the circuits regarding public safety considerations.

The post CRA public safety cases relied upon by SEPTA are decidedly not in conflict with the decision of the Third Circuit. Just as the Third Circuit has done, they incorporate public safety considerations *for the specific job in question* in determining whether a test that causes a disparate impact is "job related" and a "business necessity." *Smith v. City of Des Moines, Iowa*, 99 F.3d 1466, 1471 (8th Cir. 1996); *Fitzpatrick v. City of Atlanta*, 2 F.3d 1112 (11th Cir. 1993).

Smith dealt with hiring criteria in the context of the public safety job of firefighters. 99 F.3d at 1471. Public safety concerns were considered both in assessing the job-relatedness and business necessity of the requirements. *Id.* SEPTA neglects to mention the *Smith* court's reiteration that the separate criterion of business necessity must be proved by the standard of "necessary to safe and efficient job performance." 99 F.3d at 1471 (*quoting Dothard v. Rawlinson*, 433 U.S. 321, 322 n. 14 (1977)). The plaintiff in *Smith* was incapable of wearing a breathing apparatus needed to be worn when fighting fires and his aerobic capacity level was measured at 22.2 mL/kg/min when the department requirement was 33.5 mL/kg/min The Eighth Circuit found the cutoff level of 33.5 mL/kg/min was job related and a business necessity based on a

series of performance test simulations which linked successful performance with the specific aerobic capacity level of 33.5 mL/kg/min or higher.[12]

In *Fitzpatrick*, the Eleventh Circuit simply makes the need for public safety part of the business necessity showing but warns:

> "Merely asserting the safety rationale does not suffice to prove the defense. See *Maclennan v. American Airlines, Inc.*, 440 F. Supp. 466, 472 (E.D. Va. 1977) ('[T]he incantation of a safety rationale is not an abracadabra to which [a] [c]ourt must defer judgment.') An employer's subjective belief that a practice is necessary, without any supporting evidence, is plainly insufficient to justify a discriminatory practice. . . . *employers have been required to present convincing expert testimony demonstrating that a challenged practice is in fact required* . . . . "

2 F.3d at 1119, n. 6 (emphasis provided). The Eleventh Circuit's description of business necessity is substantially the same as that of the Third Circuit in this case: safety

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[12] Indeed, *Smith* supports the position of plaintiffs in this case. There are no data comparable to those relied upon by the *Smith* court that would validate SEPTA's cut-off of 42 mL/kg/min To the contrary, SEPTA's own promotion and commendation practices confirm that individuals well below the 42 mL/kg/min threshold perform competently.

Smith also casts doubt on the 42 mL/kg/min threshold for police. The strenuousness of the task of fighting fires cannot be doubted, and Petitioner has yet to offer convincing proof to distinguish the aerobic capacity requirements of its police from those of firefighters to justify such a drastically higher aerobic capacity level from 33.5 mL/kg/min to 42.5 mL/kg/min.

concerns are legitimate concerns but discriminatory practices must be proved necessary to meet those concerns, not simply asserted.

Nothing in these decisions reduces the "job related" and separate "business necessity" tests of *Griggs* and the CRA.

The remaining decisions cited by Petitioner are pre CRA cases and are therefore irrelevant to analysis of the CRA. *See Lanning v. SEPTA*, Pet. App., pp. 19a-20a n. 16; *Davis v. City of Dallas*, 777 F.2d 205, 211 (5th Cir. 1985);[13] *Chrisner v. Complete Auto Transit, Inc.*, 645 F.2d 1251, 1262-63 (6th Cir. 1981) ("when the job clearly requires a high degree of skill and the economic and human risks involved in hiring an unqualified applicant are great, the employer bears a correspondingly lighter burden to show

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[13] Petitioner relies upon the pre CRA case of *Davis v. City of Dallas*, where the appellate court upheld a college-level education requirement for police officers because it "bears a *manifest relationship* to the position of police officer." (emphasis added). 777 F.2d 205, 211 (5th Cir. 1985). Since education was an intangible criterion not easily subject to a validation study, the *Davis* court permitted expert testimony in lieu of a validation study showing that the employment criterion was job related and a business necessity. 777 F.2d at 217-218. That testimony, which included "nationwide studies and reports and expert testimony", was then reviewed and deemed to be adequate for this purpose. *Davis* found validation in national norms. Thus, even the less exacting case of *Davis* demonstrated more evidence than the district court required to determine the hiring criteria was a business necessity. In this case, the national norm for law enforcement and police entry requirements including agencies charged with drug interdiction, the protection of the President of the United States, and patrolling major metropolitan areas, does *not* support Defendant's test.

that his employment criteria are job related"); *Hodgson v. Greyhound*, 499 F.2d 859, 862-63 (7th Cir. 1974) (not a Title VII case but an age-discrimination claim with completely different standards); *Spurlock v. United Airlines, Inc.*, 475 F.2d 216, 219 (10th Cir. 1972) ("business necessity" and "job-related" as disjunctive requirements and the holding only dealt with the "job-related" standard); *Harris v. Pan Am*, 649 F.2d 670 (9th Cir. 1980) (business necessity is not met by showing a requirement is "reasonable" but must be shown to be "necessary to the safe and efficient operation of a business," *citing Dothard*). Moreover, when examined, most are cited in the context of the "job-related" prong, which is not the subject of the petition.

The cry of a threat to public safety has an initial, indeed compelling, allure. However, as has been demonstrated above, the Third Circuit in no way disregarded public safety and *explicitly invited SEPTA to prove such a threat upon remand*. The Third Circuit very clearly makes public safety part of the business necessity analysis in the same way that the cases cited by Petitioner do, so that this ground for seeking a writ of certiorari is without merit.

CONCLUSION

Too often fear is used as a trigger to avoid scientific or empirical analysis and to permit reliance on stereotype and bias. As this Court stated in *United States v. Virginia*, "women seeking careers in policing [have] encountered resistance based on fears that their presence . . . would deprive male partners of adequate assistance. . . . Field

studies did not confirm these fears." 518 U.S. 515, 545 (1996). Nevertheless, Petitioner has a requirement that results in near total exclusion of female applicants when no other law enforcement agency or police department has found it necessary to adopt such an entry level requirement. The Third Circuit's standard simply mandates that Petitioners back up their discriminatory requirement with more than fear by proving empirically that its cutoff is "necessary to successful performance" as a transit officer.

Petitioner has failed to demonstrate why interlocutory review should be taken of the Third Circuit's decision when it conflicts with no other post CRA circuit decisions and in fact mirrors the holdings of this Court. The writ should be denied.

Respectfully submitted,

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